No. 86-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY,
THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY,
BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
AND CSX TRANSPORTATION, INC.,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF
WAY EMPLOYES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF AMICUS CURIAE THE NATIONAL RAILWAY LABOR CONFERENCE

WILLIAM J. CURTIN
HARRY A. RISSETTO *
THOMAS E. REINERT, JR.
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5084

Of Counsel:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Railway Labor Act prohibits a rail union from threatening or undertaking economic action against a carrier when the union has not exhausted the Act's major dispute resolution procedures with respect to that carrier.

2. Whether the Railway Labor Act prohibits a rail union from threatening or undertaking nationwide economic action against railroad industry carriers when the union has not exhausted the Act's major dispute resolution procedures in national handling.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-39

BURLINGTON NORTHERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY,
MISSOURI PACIFIC RAILROAD COMPANY,
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
BALTIMORE AND OHIO RAILROAD COMPANY,
BALTIMORE AND OHIO CHICAGO TERMINAL COMPANY,
CHESAPEAKE AND OHIO RAILWAY COMPANY,
AND CSX TRANSPORTATION, INC.,
Petitioners,

v.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE THE NATIONAL RAILWAY LABOR CONFERENCE

INTERESTS OF AMICUS CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the *Amicus Curiae*, the National Railway Labor

[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk of this Court.

Conference, files this brief in support of petitioners, Burlington Northern Railroad Company, *et. al. Amicus Curiae* adopts and supports the arguments of the petitioners that federal courts may, consistent with the Railway Labor Act [2] and the Norris-LaGuardia Act,[3] enjoin secondary economic action in rail disputes. This brief supplements petitioners' argument for reversal of the decision below,[4] and focuses exclusively on whether the Railway Labor Act should be interpreted as prohibiting economic action by a rail union against neutral, secondary carriers after exhaustion of the Act's procedures with respect to a single, primary carrier.

The National Railway Labor Conference (hereinafter "NRLC" or "Conference") is the multiemployer representative of its member railroads both in national collective bargaining with unions pursuant to the Railway Labor Act and in regard to other labor-management problems that are of concern to the railroads generally. Most of the nation's Class I railroads are members of the Conference and authorize the Conference to represent their interests in multicarrier, national collective bargaining. The Burlington Northern Railroad Company and other petitioner carriers are members of the NRLC. The union action which precipitated this and related litigation, the April 8, 1986, telegram threat of a nationwide work stoppage by the President of the Brotherhood of Maintenance of Way Employes (hereinafter "BMWE") to the Association of American Railroads, was directed towards carrier members of the NRLC.[5]

---

[2] Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (1982).

[3] Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (1982).

[4] *Burlington Northern R. R. v. BMWE*, 793 F.2d 795 (7th Cir. 1986).

[5] *See Brotherhood of Maintenance of Way Employes v. Association of American Railroads*, 639 F. Supp. 220 (D.D.C.), *affirmed sub nom. Central Vermont Ry. v. BMWE*, 793 F.2d 1298 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE*, slip op. No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986); *Richmond, Fredericksburg & Potomac R.R. v. BMWE*, slip op. No. 86-3544 (4th Cir. April 12, 1986), *vacated*, 795 F.2d 1161 (4th Cir. 1986); *Norfolk and Western Ry. v. BMWE*, 795 F.2d 1169 (4th Cir. 1986).

This case arose originally from a bargaining dispute between the BMWE and two small railroads, the Maine Central Railroad (hereinafter "MEC") and its subsidiary, the Portland Terminal Company (hereinafter "PT"). The BMWE represents those carriers' maintenance of way employees, and the dispute related to the rates of pay, rules, and working conditions applicable to that group of employees. The MEC/PT dispute began with negotiations in 1984 which, after exhaustion of the Railway Labor Act major dispute procedures, lead to a lawful strike by the BMWE against MEC/PT beginning on March 3, 1986. *See* Report To The President By Emergency Board No. 209 (June 20, 1986) (hereinafter "Report No. 209"). It was the extension of the BMWE-MEC/PT work stoppage to petitioners, and other NRLC carriers who are "strangers" to the MEC/PT dispute, 793 F.2d at 798, that gave rise to this litigation.[6]

---

[6] The BMWE's April 8, 1986 threat of a nationwide work stoppage never came to full fruition. During early April, 1986, BMWE conducted picketing and work stoppages against several NRLC carriers, but those actions were enjoined by several courts prior to the realization of their full impact. On May 15, 1986, the United States Court of Appeals for the Second Circuit stayed a district court injunction applicable to the Consolidated Rail Corporation. The BMWE promptly struck and/or picketed Conrail at eighty locations across its rail system. Union agents picketed several Conrail facilities and, even where there was no picketing, Conrail employees represented by the BMWE responded to the Union's call to pressure Conrail by engaging in work stoppages. *See Consolidated Rail Corp. v. BMWE*, slip op. No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986). As a result of the Conrail disruption, President Reagan on the following day issued Executive Order No. 12,577, 51 Fed. Reg. 18,429 (May 20, 1986), 11 Weekly Comp. Pres. Doc. 643 (1986) appointing Presidential Emergency Board No. 209 to investigate and report on the BMWE's dispute with the MEC/PT, pursuant to Section 10 of the Railway Labor Act, 45 U.S.C. § 160. *See* Report No. 209.

The Conference believes that there are additional considerations relating to NRLC's interests and the BMWE's industry role which were not fully developed by the parties below, but are crucial to this Court's informed review of the Railway Labor Act issues raised by this case.

Most significantly, the BMWE represents not only maintenance of way employees on the MEC/PT, but the same craft or class of employees on the petitioner carriers, and indeed, most of the carriers in the industry. *See* 49 *National Mediation Board Annual Report* at 38 (1983); Report to the President By Emergency Board No. 211 (August 14, 1986) (hereinafter "Report No. 211"). Concurrently with the BMWE-MEC/PT dispute, the BMWE and the NRLC, as representative of its member carriers, were engaged in "national handling" collective bargaining negotiations. Report No. 211.[7]

Consistent with industry practice, the same pay and work rule issues raised by BMWE's "Section 6 notices" in the BMWE-MEC/PT dispute were the subject of the BMWE-NRLC bargaining for maintenance of way employees employed by the majority of the nation's rail carriers. *See* Report No. 209; Report No. 211; *Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 605 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971). Historically, the BMWE and MEC/PT have either participated in national handling or agreed to be bound by the terms of national settlements. Report No. 209. In 1984, the BMWE requested that MEC/PT participate in national handling, but MEC/PT declined to do so. *Id.*

Thus, the NRLC, as representative of petitioners and other carriers, was in mediation with the BMWE on

[7] Bargaining between the NRLC and BMWE commenced on June 21, 1984; in January 1985, mediation was initiated; the parties were released by the National Mediation Board on June 2, 1986; on July 15, 1986, the President established Emergency Board No. 211. Report No. 211.

national issues parallel to the BMWE-MEC/PT dispute at the time BMWE threatened and initiated a nationwide work stoppage against the NRLC-represented carriers.

SUMMARY OF ARGUMENT

Amicus Curiae maintains that the policies and procedures of the Railway Labor Act, when viewed in the context of railroad industry labor relations, must be construed as prohibiting a rail union which has exhausted the Act's procedures with one carrier from threatening or initiating economic action against other neutral carriers.

In concluding that secondary economic action is permissible under the Railway Labor Act, the court below interpreted the statute with excessive literalism and failed to enforce its fundamental obligations and procedures. Historically, the courts have actively developed the parties' general obligations and duties under the Act, and have inferred limitations on the use of economic self-help based upon the Act's central purpose of avoiding interruptions to commerce.

Self-help after exhaustion of the major dispute resolution procedures of the Railway Labor Act must be carrier-specific. Exhaustion of the Act's procedures gave the BMWE the legal power to engage in self-help against the MEC/PT. But the Act should not permit the BMWE to threaten or initiate work stoppages against other neutral carriers with whom the BMWE had not exhausted the Act's procedures. BMWE's utilization of economic weapons against NRLC-represented carriers, while BMWE and NRLC were in national handling mediation, violates BMWE's obligations under Section 2 First and is inherently destructive of the Act's negotiation and mediation procedures under Sections 5 and 6.

The BMWE's tactics and the decision below, by permitting nationwide work stoppages in the absence of

nationwide bargaining, fundamentally alter an industry bargaining structure which has limited national strike threats to circumstances of multicarrier bargaining in "national handling." A union subject to the Railway Labor Act should be permitted to threaten or initiate a nationwide work stoppage against various carriers *only* if it has engaged in national handling and exhausted the Act's procedures vis-a-vis the national multicarrier group.

ARGUMENT

I. THE RAILWAY LABOR ACT SHOULD BE INTERPRETED AND ENFORCED CONSISTENTLY WITH ITS POLICIES AND PROCEDURES TO LIMIT ECONOMIC SELF-HELP

As a preliminary matter to its argument in chief, the *Amicus Curiae* believes that the Court should approach this case with the traditionally active interpretative approach the Court has consistently utilized in enforcing the Railway Labor Act.

A. Courts Have Avoided A Literal Standard Of Interpreting The Railway Labor Act

In interpreting the Railway Labor Act as placing no limitation on a rail union's use of secondary economic pressure, the court below fundamentally misconstrued the role of the federal courts in enforcing the Act. The court opined that "[t]he Railway Labor Act is a statute establishing rules, not a statute establishing goals and calling on the judiciary to create the rules." 793 F.2d at 803. But, as this Court recognized in *Chicago & North Western R.R. v. United Transp. Union*, 402 U.S. 570 (1971), the Railway Labor Act is the paradigm of a statute articulating broad goals and duties, and calling upon the judiciary to amplify and enforce those duties to ensure that the Act's goals are realized.

The Court in *Chicago & N.W.R.R.* stated:

> We have often been confronted with similar questions in connection with other duties under the Railway Labor Act. Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

402 U.S. at 578. As the Court recognized, this broad role for judicial interpretation of the Act was intended by its drafters:

> "We believe, and this law has been written upon the theory, that in the development of the obligations in industrial relations and the law in regard thereto, there is more danger in attempting to write specific provisions and penalties into the law then there is in writing general duties and obligations into the law and letting the enforcement of those duties and obligations develop through the courts in the way in which the common law has developed in England and America."

402 U.S. at 576-7 (citing testimony of union counsel Donald R. Richberg, Hearings on Railroad Labor Disputes (H.R. 7180) before the House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 91 (1926)).[8]

The sixty year history of this Court's enforcement of the Railway Labor Act is characterized by judicial in-

---

[8] The Railway Labor Act was a collectively-bargained piece of legislation "ratified by the Congress and the President." *Chicago & N.W.R.R.*, 402 U.S. at 576. In interpreting the Railway Labor Act, the federal courts have been called upon to act analogously to a labor arbitrator, whose "source of law is not confined to the express provisions of the contract, as the industrial common law —the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581-582 (1960).

itiative to effectuate the Act's policies and procedures. In *Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548 (1930), the Court inferred authority from the Act's major and minor dispute procedures for judicial enforcement of the freedom to choose bargaining representatives. The Court in *Virginian Ry. v. System Federation 40*, 300 U.S. 515 (1937) found a judicially enforceable duty to negotiate based upon the Act's representation proceedings. Similarly, in *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the Court developed a judicially enforceable duty of fair representation based upon the Act's goals and structure. Thus, the petitioners' argument for an implied restriction on secondary activity under the Railway Labor Act is completely consistent with this Court's traditional exegesis of the Railway Labor Act based upon its policies and procedures.

The court below, and the other courts of appeals which have reviewed secondary boycott issues arising from the BMWE-MEC/PT dispute, also were misled in their analyses by the express treatment of secondary economic action under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.* (1982). In a simplistic approach, the courts have interpreted the absence of a provision in the Railway Labor Act analogous to the express prohibition on secondary boycotts contained in Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), as determinative of the issue whether the RLA restricts secondary economic action. 793 F.2d at 801-802.[9] But the federal courts previously have not hesitated to imply and enforce obligations under the Railway Labor Act in the absence of statutory language parallel to the express provisions of the NLRA.

---

[9] *See Richmond, Fredericksburg & Potomac R.R. v. BMWE*, 795 F.2d 1161, 1166 (4th Cir. 1986); *Central Vermont Ry. v. BMWE*, 793 F.2d 1298, 1303 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE*, 792 F.2d 303, 304 (2d Cir. 1986). *See also Brotherhood of Maintenance of Way Employes v. Guilford Transportation Industries, Inc.*, No. 86-1366, slip op. at 17 (1st Cir. Oct. 28, 1986).

For example, there is no express restriction on recognitional picketing under the RLA equivalent to Section 8(b)(7) of the NLRA, 29 U.S.C. § 158(b)(7). Nonetheless, courts have enjoined recognitional picketing under the RLA in order to preserve the RLA's representational procedures. *Summit Airlines v. Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980). Similarly, there is no express authorization of federal court jurisdiction over contract breaches under any RLA equivalent to Section 301 of the NLRA, 29 U.S.C. § 185; and, indeed, Section 3 of the RLA, 45 U.S.C. § 153, gives the adjustment boards exclusive jurisdiction of such disputes. Nonetheless, courts have enjoined alleged carrier breaches of agreements in order to preserve the integrity of both the major and minor dispute procedures of the RLA. *See Brotherhood of Locomotive Engineers v. Missouri-K.-T. R.R.*, 363 U.S. 528 (1960); *Detroit & Toledo Shore Line R.R. v. United Tranp. Union*, 396 U.S. 142 (1969); *Local 553, TWU v. Eastern Air Lines*, 695 F.2d 668 (2d Cir. 1982).[10] The literalism of the decision below is, thus, uncharacteristic of historical Railway Labor Act exegesis.

B. Courts Have Interpreted The Railway Labor Act As Implicitly Restricting Self-help

Most importantly, the courts have not hesitated to emendate the Act to identify, define and limit judicially the parties' implicit rights to self-help. The words of the Railway Labor Act do not address the parties' repective rights to engage in economic self-help. This legisla-

---

[10] There is also no express "unfair labor practice" provision under the RLA equivalent to Section 8(a) of the NLRA, 29 U.S.C. § 158(a), but many courts have examined various carrier actions and applied unfair labor practice theories borrowed from the NLRA. *See Air Line Pilots Ass'n v. United Air Lines, Inc.*, 802 F.2d 886 (7th Cir. 1986); *but see Independent Union of Flight Attendants v. Pan American World Airways*, 789 F.2d 139 (2d Cir. 1986).

tive silence was intentional, because Congress did not want to suggest that the Act permitted unrestrained action after exhaustion of its procedures:

> [I]f strikes were in express terms forbidden for a given period there might be an implication that after that period strikes to interfere with the passage of the United States mails and with continuous transportation service might be made legal. In the opinion of the committee, this possible implication should be avoided.

House Rep. No. 328, 69th Cong., 1st Sess. 5 (1926). Yet, the legislative history clearly anticipates the possibility of self-help after exhaustion of the Act's procedures. *Id.* at 4-5.[11] The Court has implied the right of the parties to use economic self-help after exhaustion of the Act's procedure, based upon the Act's failure to provide compulsory binding arbitration as a means of settling major disputes. *Brotherhood of Locomotive Engineers v. Baltimore & O.R.R.*, 372 U.S. 284, 290-291 (1963); *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 244 (1966).

But post-exhaustion self-help under the Railway Labor Act is not Armageddon. "Were a strike to be the occasion for a carrier to tear up and annul, so to speak, the entire collective bargaining agreement, labor-management relations would revert to the jungle." *Railway Clerks v. Florida East Coast Ry.*, 384 U.S. at 247 (1966). Instead, the Court has "honored" the "spirit of the Railway Labor Act" by forbidding an employer after exhaustion of the major dispute procedures to make sweeping changes in work rules during a strike. *Id.* The petitioner railroads seek a similar judicial limitation on the union's right to self-help.

---

[11] The Railway Labor Act in its silence concerning strikes contrasts sharply with the National Labor Relations Act, which specifies under Section 13 that employees have a right to strike, except as expressly limited by the Act. 29 U.S.C. § 163; *See NLRB v. Erie Resistor Co.*, 373 U.S. 221 (1963).

In judicially defining the parties' use of self-help, the Court has been guided by the express purposes of the Railway Labor Act:

> (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions . . . .

Section 2, 45 U.S.C. § 151a. Navigating on these polestars the Court has consistently limited the parties' use of self-help in order to preserve the Act's policies and procedures. Despite the lack of express authority in the RLA, the Court has permitted injunctions precluding self-help until the parties have exhausted major dispute collective bargaining procedures, or, even after exhaustion, when a party has failed to bargain in good faith. *Chicago & N.W.R. R. v. United Transp. Union*, 402 U.S. 570 (1971). The Act also makes no provision for injunctions requiring adherence to the procedures for the mandatory adjustment of grievances. Yet, the Court has authorized injunctions against self-help when the underlying minor dispute could be solved by the grievance procedures specified in the collective bargaining agreement and the statute. *Brotherhood of Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957).

Amicus Curiae believes that the restriction on secondary economic pressure sought by petitioners is justified by the policies and procedures of the Act in the same fashion as the limitations upon self-help found in *Florida East Coast*, *Chicago & N.W.R.R.* and *Chicago River*. A literal reading of the Railway Labor Act, uninformed by the Act's policies, procedures, and bargaining structure, should not determine this case.

II. THE RAILWAY LABOR ACT PROHIBITS A RAIL UNION FROM UNDERTAKING ECONOMIC ACTION AGAINST A CARRIER WHEN THE UNION HAS NOT EXHAUSTED THE ACT'S MAJOR DISPUTE RESOLUTION PROCEDURE WITH RESPECT TO THAT CARRIER

The decisions of the courts of appeals which have reviewed the BMWE's use of work stoppages against secondary employers in the MEC/PT dispute have taken a myopic view of the Railway Labor Act and have failed to consider the bargaining structure of the railroad industry. In refusing to limit the scope of BMWE's self-help against neutral, secondary employers, the courts have focused exclusively upon the BMWE-MEC/PT relationship under the Railway Labor Act. *Amicus Curiae* maintains that examining BMWE's economic action from the perspective of industry-wide bargaining demonstrates its unlawfulness under the Railway Labor Act.

A. The Labor Relations Structure Of The Railroad Industry

The issue of the lawfulness of secondary economic action under the Railway Labor Act must be reviewed with due consideration of the unique labor relations structure of the railroad industry.[12]

---

[12] As Justice Frankfurter so aptly noted:

> From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agreements and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

Elgin, J. & E.R.R. v. Burley, 325 U.S. 711, 751 (1945) (Frankfurter, J., dissenting).

The railroad industry is heavily and uniformly unionized. The union's railroads were one of the first industries to be unionized, and remain, almost a century later, one of the most thoroughly unionized industries in the nation. *See The Railway Labor Act At Fifty* 17-18, 24-26 (C. Rehmus, ed. 1977). The industry's bargaining structure of traditionally distinct crafts or classes and systemwide bargaining units has been preserved by the National Mediation Board. *See Switchmen's Union v. National Mediation Board*, 135 F.2d 785, 794 (D.C. Cir.), *rev'd on other g'nds*, 320 U.S. 297 (1943); *see also New Jersey Transit Rail Op.*, 11 NMB 57 (1983). Maintenance of way employees, for example, form a distinct craft or class. *See* 49 *National Mediation Board Annual Report* at 38 (1983); *New York C.R.R.*, 1 NMB 17 (1937).

This bargaining unit structure has resulted in single rail unions representing the same groups of employees on practically all carriers in the industry. The Brotherhood of Maintenance of Way Employes, for example, represents maintenance of way employees on 32 of 33 major carriers. *See* 49 *National Mediation Board Annual Report* at 38 (1983). In the 1986 multicarrier, multiunion bargaining, BMWE represented the employees of some 85 industry carriers. *See* Report No. 211. The BMWE's industry-wide representation is not unique, but rather, is characteristic of the hegemony of other major rail unions such as the Brotherhood of Locomotive Engineers, the United Transportation Union, and the Brotherhood of Railway, Airline & Steamship Clerks. *See* 49 *National Mediation Board Annual Report* at 38 (1983).[13]

---

[13] The airline industry, which is also subject to the Railway Labor Act, 45 U.S.C. § 181 *et seq.*, exhibits similar industry-wide union dominance in certain crafts or classes. The Air Line Pilots

This industry structure gives rail unions a unique ability to conduct industry-wide work stoppages. A union such as the BMWE has industry-wide presence which enables it, if it chooses, to utilize a variety of tactics to accomplish the withdrawal of services by the employees it represents on the major rail carriers. Further, because there is a strong tradition in the railroad industry of honoring the picket lines of unions representing other crafts,[14] a rail union can extend a work stoppage beyond the employees it represents, and impair a carrier's operations. Thus, in terms of economic and operational impact upon a carrier, there is no real distinction in the rail industry between being the target of secondary pickets or the object of a primary economic strike.

The courts which have reviewed the BMWE's actions against neutral carriers appear to have incorrectly viewed picketing and strikes as practically and legally distinguishable forms of economic action under the Railway Labor Act. *See Brotherhood of Maintenance of Way Employees v. Association of American Railroads*, 639 F. Supp. at 223-224, 227 n. 20 (D.D.C.), *affirmed*, 793 F.2d 1298 (D.C. Cir. 1986). The National Labor Relations Act under Sections 7, 8(b)(4), 8(b)(7), and 13

Association is the primary representative of flight crew members, and the International Association of Machinists is the dominant representative of mechanics; other crafts, such as flight attendants, have more competing or company-specific unions. *See* 49 *National Mediation Board Annual Report* at 40. In the recent *Texas Air-Eastern Acquisition Case*, U.S. Department of Transportation, Docket No. 43825, the International Association of Machinists stated that in light of the recent BMWE decisions the possibility of a nationwide disruption of the air transportation system has been "greatly increased."

[14] *See Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603, 613 (D.C. Cir.), *cert. denied*, 403 U.S. 911 (1971); *Western Maryland R.R. v. Systems Board*, 465 F. Supp. 963, 975 (D. Md. 1979).

does distinguish strikes, picketing and general "concerted activities". 29 U.S.C. §§ 157, 158(b)(4), 158(b)(7), 163. In contrast, the Railway Labor Act takes a more pragmatic approach and focuses only on the effects of economic actions in terms of "*any* interruption to commerce." 45 U.S.C. §§ 151a(1), 152 First (emphasis added).

In this case, the BMWE's threat and actions were not limited to secondary "picketing": the April 8, 1986 telegram threatened to "shut down the nation's railroad system," by "ask[ing] our members and other railroad employees to withdraw their services." And with respect to Conrail, there is evidence that the BMWE both placed pickets and issued strike instructions to its members on the neutral carriers. *See supra* note 6.

In terms of the BMWE's bargaining relationships with industry carriers, and the BMWE's collective bargaining goals, there is also no real distinction between picketing and a strike against neutral carriers. The BMWE, a national rail union, represents both the neutral carriers' maintenance of way employees and the MEC/PT employees. Indeed, the national union capitalized on those relationships by extending the MEC/PT work stoppage to its members on the neutral NRLC carriers. While the BMWE may argue that its primary strike on the MEC/PT and its secondary economic actions against petitioners are motivated solely by BMWE concerns on the MEC/PT, the work stoppages on the neutral carriers can only embitter the bargaining relationships between BMWE and the neutral carriers in the same manner as if they were the targets of a primary strike. The union's motives for economic action is also a matter within the sole evidentiary control of the union. Further, it is impossible, in practice, to distinguish union goals between primary and secondary carriers in an industry where

wages, benefits, and to a lesser degree workrules, have had a national consistency.[15]

In this case the BMWE's apparent goals also have not been "secondary" in its traditional sense. Secondary activity has been defined as economic pressure against a third party with the goal of having the third party cease doing business or otherwise bring pressure upon the primary employer. *See Local 761, Electrical Workers (IUE) v. NLRB*, 366 U.S. 667, 672, 673-674 (1961); *Longshoremen v. Allied Int'l, Inc.*, 456 U.S. 212, 224 (1982); *Kroger Co. v. NLRB*, 647 F.2d 634, 637 (6th Cir. 1980). The BMWE maintains that it can undertake work stoppages against carriers who have effectively no operational interaction with MEC/PT and are "strangers" to the dispute. 793 F.2d at 798, 799. The BMWE's transparent goals in extending the MEC/PT work stoppage were to precipitate a national rail emergency in order to obtain the appointment of a Presidential Emergency Board in the MEC/PT dispute and, ultimately, to affect the outcome of ongoing collective bargaining on the secondary carriers. *See supra* note 6.

B. The BMWE Owed A Duty Under Section 2 First To Petitioners And Other NRLC Carriers

Section 2 First has been termed by this Court as "the heart of the Railway Labor Act." *Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369, 377-378 (1969); *Chicago & N.W.R.R. v. United Transp. Union*, 402 U.S. 570, 574 (1971). The Section, which

---

[15] This is well illustrated by the parallel issues between the concurrent BMWE-MEC/PT dispute and the BMWE-NRLC dispute. *Compare* Report No. 209 and Report No. 211. One of the principal recommendations of Emergency Board No. 209 was that the parties in the BMWE-MEC/PT dispute "should agree to be bound by the results of the national negotiations involving rates of pay and health and welfare programs." Report No. 209.

the Court found judicially enforceable in *Chicago & N.W. R.R.*, provides:

> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

45 U.S.C. § 152.

The courts have consistently viewed Section 2 First as placing an obligation on the parties to Railway Labor Act collective bargaining relationships to utilize all available mechanisms to resolve their disputes short of economic action.[16] The BMWE, as representative of petitioners' and other NRLC carriers' maintenance of way employees, is subject to the constraints of Section 2 First in its bargaining relationship with those carriers.[17]

---

[16] *See Chicago & N.W.R.R. v. United Transp. Union*, 402 U.S. 570 (1971) (major dispute procedures); *Brotherhood of Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957) (minor dispute procedures); *Summit Airlines v. Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980) (representational procedures).

[17] Two of the courts of appeals apparently have concluded that the Section 2 First obligation runs to and from only a carrier's employees, and not their union representative. *See Central Vermont Ry. v. BMWE*, 793 F.2d 1298, 1302 n.9 (D.C. Cir. 1986); *Consolidated Rail Corp. v. BMWE*, 792 F.2d 303, 304 (2d Cir. 1986). That is plainly erroneous. This Court has never expressed any doubt that the Section 2 First obligation applies to *a union*. *Chicago & N.W.R.R.*, 402 U.S. at 571 ("The substance of the complaint was that in the negotiations between the parties over work rules, *the Union* had failed to perform its obligations under § 2 First of the Railway Labor Act . . . ."). The Second Circuit itself has found the Section 2 First obligation applicable to a union

The Consolidated Rail Corporation in *Consolidated Rail Corp. v. BMWE*, No. 86-0318T (W.D.N.Y. April 6, 1986), *vacated*, 792 F.2d 303 (2d Cir. 1986), has argued that Section 2 First obligated the BMWE to utilize the Act's Section 5 and 6 procedures of negotiation and mediation prior to undertaking economic actions against Conrail and other neutral, secondary carriers. The Second Circuit rejected this argument, finding that the delay in the Act's procedures would effectively preclude timely secondary activity. 792 F.2d at 304-305.[18] *Amicus Curiae* submits that, even assuming *arguendo* that the Second Circuit is correct in concluding that the Act's major dispute procedures are not well-suited to secondary boycott issues, that does not remove the BMWE's Section 2 First obligation to neutral, secondary carriers.

Rather, *Amicus Curiae* maintains that Section 2 First places a more absolute restriction on the BMWE's economic actions. Section 2 First creates an enforceable obligation that a union not interrupt a carrier's operations unless and until the Act's major dispute procedures have been exhausted. That obligation runs between the rail union, as representative of the carrier's employees, and the specific carrier. If a rail union has not exhausted the Act relative to a specific carrier, or cannot exhaust the Act because no procedure is well-suited to the union's concern or problem, then Section 2 First must

---

even in the absence of a bargaining relationship. *Summit Air Lines v. Teamsters Local 295*, 628 F.2d 787, 790 (2d Cir. 1980). And the Section 2 First obligation has been found to apply to individual union leaders, such as the individual respondents herein. *See, e.g., National Airlines v. Air Line Pilots Ass'n*, 78 Lab. Cas. (CCH) ¶ 11,361 (S.D. Fla. 1975). If unions are not subject to Section 2 First based upon their bargaining relationship with a carrier, then rail and airline management has been suing the wrong parties in effectively every action brought by management under Section 2 First.

[18] *See also Central Vermont Ry. v. BMWE*, 793 F.2d 1298, 1302-1303 (D.C. Cir. 1986).

be interpreted as precluding the union's use of economic self-help against that carrier. Any other interpretation will create a perverse incentive for a union to circumvent the Act's procedures to capitalize on an opportunity to utilize the leverage of unrestrained economic action.[19]

This interpretation is firmly rooted in the industry's bargaining structure and the role that industry-wide unions such as the BMWE play. The BMWE will maintain that in pursuing secondary action against petitioners and other NRLC carriers, it has acted only as representative of MEC/PT employees. Yet, at the same time, the BMWE will justify its secondary activity against neutral carriers because of the "economic self-interest" of the neutral carriers' employees it represents and their "solidarity" with MEC/PT employees. The reality is that BMWE is capable of waging successful work stoppages against neutral, secondary carriers only because of its bargaining relationships with those carriers. Further, the BMWE's pursuit of a nationwide strike is based on the rail union's perception of common issues between all carriers and all maintenance of way employees in the industry. *See supra* note 15.

The BMWE has become voluntarily the representative of neutral carrier employees, and should be subjected in those relationships to plenary obligations under Section 2 First. If BMWE's secondary work stoppages are based in the interests of the neutral carrier employees it represents, then it must exhaust the Railway Labor Act procedures with respect to those carriers prior to initiating a work stoppage against them. If BMWE's secondary work stoppages are based solely on interests of the MEC/

---

[19] That phenomenon is illustrated by rail unions' repeated attempts to characterize contract interpretation disputes as "major" in order to avoid the minor dispute procedures of the adjustment boards and to be free to engage in unenjoinable self-help. *See Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 33 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

PT employees, and not those of neutral carrier employees, then Section 2 First should be interpreted as prohibiting secondary work stoppages in order to preclude the union from exploiting its bargaining relationships with neutral carriers.

As this Court has recognized, work stoppages can be inherently destructive of bargaining relationships which the Railway Labor Act intends to preserve. *See Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238 (1966); *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 147-149 (1969). The *Amicus Curiae* submits that the most destructive work stoppages from both labor relations and interstate commerce perspectives are ones which a carrier has no ability to resolve. In the MEC/PT dispute, the BMWE instigated work stoppages against neutral carriers for the pure goal of causing a national crisis. The neutral carriers were powerless to make concessions that would terminate the BMWE's economic pressure. Making a neutral rail carrier the target of economic action, and inflicting harm upon a carrier for reasons extrinsic to any collective bargaining goal with that carrier, is plainly inconsistent with Section 2 First. If Section 2 First means anything, it must mean that a union cannot use a carrier with whom it has a collective bargaining relationship as a hostage to bargaining goals elsewhere.

For these reasons, the Conference submits that there was a firm basis in Section 2 First and *Chicago & N.W. R.R.* for enjoining secondary work stoppages by the BMWE against neutral rail carriers with whom the BMWE has bargaining relationships.

C. The BMWE's Secondary Pressure Against Neutral Carriers Undermines The Railway Labor Act's Major Dispute Procedures

The Railway Labor Act under Sections 5 and 6 imposes extensive procedures for resolving major disputes. The Act requires notices of intended changes, negotiation conferences, mediation under the auspices of the National Mediation Board, and possibly Emergency Board proceedings, prior to the parties' utilization of self-help. *See Brotherhood of Locomotive Engineers v. Baltimore & O.R.R.*, 372 U.S. 284 (1963). As this Court has recognized, the "almost interminable process" for resolving major disputes was designed to prevent interruptions to interstate commerce from rail labor disputes. *Detroit & Toledo Shore Line R. R. v. United Transp. Union*, 396 U.S. 142, 148-149 (1969). Most importantly, during these major dispute procedures, self-help is clearly precluded under the Act's "status quo" provisions. In *Detroit & Toledo Shore Line* the Court stated:

> The Act's status quo requirement is central to its design. Its immediate effect is to prevent the union from striking and management from doing anything that would justify a strike. In the long run, delaying the time when the parties can resort to self-help provides time for tempers to cool, helps create an atmosphere in which rational bargaining can occur, and permits the forces of public opinion to be mobilized in favor of a settlement without a strike or lockout.

396 U.S. at 150. As this case aptly illustrates, if the Railway Labor Act does not prohibit economic action against neutral, secondary employers, then the status quo obligation has been rendered largely nugatory.

The NRLC was engaged in multicarrier, multiunion bargaining with the BMWE on behalf of some 85 carriers, including the petitioners and almost all major rail carriers in the nation, at the time the BMWE initiated its secondary work stoppages. In April 1986 and until June 2, 1986, the NRLC and the BMWE were in mediation under the auspices of the National Mediation Board on collective bargaining issues parallel to those in BMWE's dispute with the MEC/PT. *See* Report No. 211.

Under *Detroit & Toledo Shore Line* it is beyond dispute that at the time of the BMWE's secondary threats

and work stoppages directed towards NRLC carriers, the status quo requirement of Section 6 precluded the BMWE from initiating *any* economic action against the 85 NRLC-represented carriers. Nonetheless, the decision below held, in effect, that it was lawful for BMWE at that very time to exert massive economic pressure in the form of secondary activity against those same neutral carriers.

Amicus Curiae submits that permitting economic action, for whatever reason and in whatever manner, against a carrier during the status quo period of Section 6, is inconsistent with and inherently destructive of the Railway Labor Act's procedures. BMWE may maintain that the status quo obligation only applied to issues relating to "national handling" and not the MEC/PT dispute. But such a distinction is illusory. *A work stoppage will disrupt the bargaining process no matter what the union's motivation or goals.* To paraphrase *Detroit & Toledo Shore Line*: tempers cannot cool when a carrier's operations are shut down, an atmosphere of rational bargaining no longer exists when a strike is in effect, and the forces of public opinion cannot be mobilized against a strike that has already occurred. 396 U.S. at 150.

Further, it will ultimately prove impossible to distinguish secondary and primary goals in a work stoppage during the status quo period. The possibility of pretext cannot be discounted. By exhausting with respect to one carrier and engaging in secondary economic activity a union can prematurely press bargaining goals with the neutral employer. Or the mere existence of a work stoppage can be a "flexing of muscle" in anticipation of future bargaining and an ultimate strike.[20]

---

[20] *See, e.g., American Airlines, Inc. v. Transport Workers Union*, 487 F. Supp. 249, 253 (E.D.N.Y. 1980) (ostensible sympathy strike as "the first step in an effort to obtain 'the best contract ever negotiated in the airline industry' ").

In short, if economic action is permitted against neutral, secondary carriers under the Railway Labor Act, then the carefully crafted procedures for resolving major disputes can be easily circumvented by rail unions through premature and pretextual work stoppages.

D. The Railway Labor Act's Dispute Resolution Procedures Are Comprehensive And Carrier-Specific

Amicus Curiae does not interpret the Railway Labor Act as prohibiting secondary economic action only in the circumstances where a rail union has a bargaining relationship with a neutral carrier. The Section 2 First obligation and Section 6 procedures discussed above simply illustrate how economic action against neutral, secondary carriers can be, and in this case is, a plain violation of the Act. In addition, the Conference believes that the Railway Labor Act, when viewed in its entirety, implicitly prohibits economic action against neutral, secondary carriers.

The primary error of the court below, and other courts which have reviewed the BMWE's secondary action, is that they have viewed the BMWE's action as "unregulated" under the Railway Labor Act. 793 F.2d at 804. *Amicus Curiae* submits that, to the contrary, the Railway Labor Act was intended, and has operated for sixty years, as a comprehensive scheme for regulating *all* economic action in the railroad industry.

This Court has recognized that "the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes." *Texas & N.O.R. R. v. Railway Clerks*, 281 U.S. 548, 565 (1930); *Detroit & Toledo Shore Line v. United Transp. Union*, 396 U.S. 142, 148 (1969). The Act speaks in its general purposes under Section 2 of avoiding "*any* interruption to commerce," and in Section 2 First of reaching "*all* disputes", in order to avoid "*any* interruption to commerce," 45 U.S.C. §§ 151a(1), 152 First (emphasis added). The

intent of the Act was to comprehensively treat railroad industry labor disputes, with special procedures for major disputes, Sections 5, 6, 8, 10; minor or other disputes, Section 3; and representational disputes, Section 2 Ninth. *See generally Elgin, J. & E.R.R. v. Burley*, 325 U.S. 711, 751 (1945). Indeed, Congress passed the 1934 amendments to the original 1926 Act in order, in part, to maintain this comprehensiveness and to prevent work stoppages relating to minor disputes. *See Brotherhood of Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30, 35-39 (1957). This history of comprehensive regulation of self-help has been cited by the Court as justification for more active judicial intervention under the RLA than the NLRA. *See Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 210-212 (1962).[21]

Amicus Curiae submits that, in its comprehensiveness, the Railway Labor Act deals with the lawfulness of economic action against neutral, secondary carriers. Simply stated, the only circumstances in which the Act permits self-help by a rail union against a carrier is after exhaustion of the Act's procedure with respect to that carrier. The major dispute procedures are by their terms carrier-specific, and exhaustion with respect to one carrier does not under the Act give a rail union a license to undertake work stoppages against other industry carriers.

The court below viewed Congress as somehow neglecting to include a secondary boycott provision in the Rail-

[21] The comprehensiveness of the Railway Labor Act was also recognized in the legislative history of the Norris-LaGuardia Act by that Act's principal sponsor:

> *Mr. LaGuardia:* We then passed the railroad labor act, and that takes care of the whole labor situation pertaining to the railroads. They could not possibly come under this for the reason that we provided machinery there for settling labor disputes.

75 Cong. Rec. 5499 (1932).

way Labor Act. 793 F.2d at 801-802. But rather, no secondary boycott provision has ever been necessary in the Railway Labor Act, because the Act implicitly restricts self-help against a carrier to circumstances where the major dispute procedures have been exhausted with that carrier.

There are situations, however, in which a strike against a primary carrier will have lawful secondary effects on other carriers. Where both carriers have common facilities the Act has been intepreted as permitting a union to strike the primary carrier notwithstanding its impact on the secondary carrier at such facilities. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).[22] When a secondary carrier has integrated its operations with a struck carrier or provided special assistance to the primary carrier during a strike, then economic action can be permitted against the secondary, non-neutral carrier under the "substantial alignment" or "ally doctrine" standards. *See Ashley, Drew & Northern Ry. v. United Transp. Union*, 625 F.2d 1357 (8th Cir. 1980) (substantial alignment standard).[23] *See, also, NLRB v. Teamsters Local 810 (Advance Trucking Co.)*, 299 F.2d 636 (2d Cir. 1962) (ally doctrine). These are situations, however, not of "unregulated" conduct against secondary carriers but of protection of a union's right to engage in primary economic action notwithstanding its limited effects on secondary carriers.

[22] The Conference concurs in petitioners' argument that *Jacksonville Terminal* addressed only the enjoinability of secondary activity under state law. To the extent *Jacksonville Terminal* is interpreted as opining on the enjoinability of secondary economic action under the RLA, it should be viewed as a common-situs case limited to its facts.

[23] The Conference submits that the "substantial alignment" standard which has been developed in the railroad industry under the Norris-LaGuardia Act would be more appropriately viewed as based in the procedures and policies of the Railway Labor Act.

Amicus Curiae recognizes that the analysis it suggests will require the federal courts to determine questions of "neutrality" in order to resolve whether economic action affecting another carrier is lawful. But the right to self-help was itself implied by this Court, not express in the Act, and its delineation is left to the judicial procees. The crafters of the Act anticipated just such a judicial role in the development of the Railway Labor Act. Judicially developed limitations on the right to extend lawful self-help to neutral parties also have been common under the NLRA. *See generally Woodwork Manufacturers v. NLRB*, 386 U.S. 612, 644-645 (1966).

The railroad industry needs guidance from the Court concerning the permissible scope of self-help in economic strikes under the Railway Labor Act. *Amicus Curiae* believes it is clear, however, that the type of unrestrained secondary activity undertaken by the BMWE is contrary to the policies and procedures of the Act, and cannot be permitted to recur.

III. THE RAILWAY LABOR ACT PROHIBITS A RAIL UNION FROM UNDERTAKING NATIONWIDE ECONOMIC ACTION AGAINST RAILROAD INDUSTRY CARRIERS WHEN THE UNION HAS NOT EXHAUSTED THE ACT'S MAJOR DISPUTE PROCEDURES IN NATIONAL HANDLING

If, as argued above, the Railway Labor Act prohibits extending a work stoppage against a single carrier to another neutral carrier, then *a fortiori* it prohibits rail unions from initiating nationwide work stoppages based upon exhaustion of the Act's procedures with a single carrier. The BMWE maintains that it has the power to initiate a nationwide work stoppage, through secondary economic action, in effectively *any* major dispute. *Amicus Curiae* submits that if the BMWE's position is upheld, then it will, through the proliferation of work stoppages, destroy the bargaining structure that has existed in the railroad industry for sixty years.

The BMWE's use of secondary work stoppages to escalate a local dispute into a nationwide rail emergency is unprecedented. In the history of the Railway Labor Act there have been only three widely-known labor disputes in which rail unions have undertaken any secondary economic activity: the multiunion Florida East Coast Railway dispute of the early 1960s, *see Brotherhood of Railroad Trainmen v. Jacksonville Terminal*, 394 U.S. 369 (1969); the 1978 dispute between the Norfolk and Western Railway and the Brotherhood of Railway and Airline Clerks, *see Consolidated Rail Corp. v. Railway Clerks*, 99 LRRM (BNA) 2607 (W.D.N.Y. 1978) *app. dism'd as moot*, 595 F.2d 1708 (2d Cir. 1979); and the 1986 dispute involving the MEC/PT and the BMWE.

Prior to the MEC/PT dispute, the only threat of a nationwide work stoppage in the railroad industry had arisen in "national handling." The dominant bargaining structure in the railroad industry is one of multicarrier, national bargaining on wage, benefit, and certain work-rule issues, and local bargaining on remaining issues. *See Brotherhood of Railroad Trainmen v. Atlantic Coast Line*, 383 F.2d 225, 228 (D.C. Cir. 1967), *cert, denied*, 390 U.S. 1047 (1968); Report No. 211. The nation's railroad carriers have been faced with national strikes or the threat of national strikes caused by a breakdown in national handling in 1941, 1943, 1946, 1948, 1950, 1962, 1967, 1970, 1971, and 1982. *See* 128 Cong. Rec. H7382-83 (daily ed. September 22, 1982) (statement of Rep. Broyhill); H. Lustgarden, *Principles of Railroad and Airline Labor Law* 91-96 (1984); and *The Railway Labor Act At Fifty* 156-76 (C. Rehmus, ed. 1977). Therefore, the current dispute between the BMWE and MEC/PT is unique: it is the first local dispute that, through secondary economic action against neutral carriers, has threatened to precipitate a nationwide work stoppage.

Thus, historically, self-help has been coterminous with the scope of bargaining. In *Delaware & Hudson Ry. v. United Transp. Union*, 450 F.2d 603 (D.C. Cir.), *cert.*

denied, 403 U.S. 911 (1971), the Court considered rail unions' use of selective strikes after exhaustion in national handling disputes. The Court concluded that rail unions which engage in national handling are not obligated to conduct nationwide strikes, but could elect to conduct work stoppages against only select carriers. That result is based on the fact that the union had, through national handling, exhausted the Act with each carrier.

But the converse cannot be permitted: a rail union cannot undertake a nationwide work stoppage without national handling and after exhausting the Act with only one carrier. To hold otherwise would ignore the mandate of the Section 6 procedures.[24] Further, under the reasoning of *Brotherhood of Railroad Trainmen v. Atlantic Coast Line*, 383 F.2d 225, 228 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1047 (1968), BMWE's unprecedented use of nationwide work stoppages constitutes an attempt to unlawfully modify the railroad industry's bargaining structure in violation of the union's obligation under Section 2 First.[25]

Permitting the BMWE's nationwide use of secondary economic action will have dramatic effect on rail industry bargaining. There are an estimated 1000 railroad industry collective bargaining agreements involved in major disputes annually. *See The Railway Labor Act At Fifty* 246 (C. Rehmus ed. 1977) 246. Each of these major disputes can now become an occasion for a geographically broad, and potentially nationwide, work stoppage threat.

[24] If the BMWE could initiate a nationwide work stoppage after exhausting with respect to MEC/PT, then under the rationale of *Delaware & Hudson* the NRLC carriers should be able to initiate a nationwide lockout against the BMWE, notwithstanding the lack of exhaustion of the Act's procedures in national handling. 450 F.2d at 614-615. Any other result would destroy the mutuality of self-help weapons which has been characteristic of collective bargaining under the Railway Labor Act.

[25] In *Atlantic Coast Line*, the court concluded that multicarrier bargaining is lawful, and sometimes obligatory under the Railway Labor Act. 383 F.2d at 229. The approach of *Atlantic Coast Line* was to imply a duty under Section 2 First for parties in rail disputes to maintain the national bargaining structure. Whatever the contours of such a duty, the BMWE clearly has breached it and attempted to undermine the national bargaining structure by threatening and initiating nationwide economic action outside national handling.

The decision below, if upheld, can only lead to an escalation and proliferation of work stoppages and interruptions to commerce in the rail industry. There have been only 211 Emergency Boards appointed by Presidents pursuant to Section 10 in the sixty years of Railway Labor Act history.[26] The potential proliferation of rail industry strike threats could require the appointment of as many Emergency Boards in the next six years, as has been required in the last sixty.

For sixty years rail labor and management have understood the Railway Labor Act's restraints and the rules for collective bargaining and economic self-help. The decisions of the courts of appeals permitting secondary work stoppages in the BMWE-MEC/PT dispute have dramatically changed the rules.

Amicus Curiae requests the Court to restore and preserve the traditional bargaining structure in the railroad industry. The Railway Labor Act has been an effective statute that has met its stated purposes and avoided interruptions to interstate commerce and facilitated the resolution of labor disputes for sixty years. This Court should not permit the unrestrained tactics of one rail union, and the uninformed and literal interpretations of the Act by several courts, to result in dramatic and destabilizing changes in the Railway Labor Act's application and enforcement.

[26] The Railway Labor Act's drafters anticipated the "it should be seldom, if ever, necessary for the President to exercise the power conferred upon him to appoint an emergency board." House Report No. 328, 69th Cong. 1st Sess. 4 (1926).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* National Railway Labor Conference urges that the Court reverse the decision below.

Respectfully submitted,

WILLIAM J. CURTIN
HARRY A. RISSETTO *
THOMAS E. REINERT, JR.
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5084

Of Counsel:

MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-5000

* *Counsel of Record*